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No. 165

In the Supreme Court of the United States

OCTOBER TERM [redacted] 1969

MOJAVE URANIUM COMPANY
a Nevada corporation,
Petitioner,

vs.

MESA PETROLEUM COMPANY
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF IN OPPOSITION FOR RESPONDENT MESA PETROLEUM COMPANY

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9 Collier on Bankruptcy, 14th Edition, Sec. 8.11, p. 180 4

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No. 1449

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OCTOBER TERM 1968

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a Nevada corporation

Petitioner,

vs.

MESA PETROLEUM COMPANY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF IN OPPOSITION FOR RESPONDENT MESA PETROLEUM COMPANY

QUESTION PRESENTED

In an apparent effort to interest this Court and to obtain a Writ of Certiorari, petitioner has misstated the question presented and therefore respondent submits the following as the real question presented:

Under the unique and isolated fact situation of this case, what effect, if any, does confirmation under a Chapter XI proceeding of the Bankruptcy laws have upon a creditor which was unsecured at the time of said confirmation.

STATEMENT OF THE CASE

Sometime during the period from 1957 to 1961 Mojave allegedly loaned (R.1) to Standard sums of money uncertain both as to the amounts and as to the source of the funds so loaned. (Depo. 43 & 45). On March 2, 1960 Mojave received a second mortgage on certain personal property represented as being owned by Standard. (Ex. P-17). Standard became financially distressed during the period 1960 to 1962 and was besieged by suits, demands of creditors and repossessions. (Depo. 5, 16 & 17).

Robert J. Pinder, then president of Standard and also a close relative of the officers of Mojave, *represented Mojave* in the negotiations which culminated in the agreement to release the security. (Depo. 6, 11, 16, 38, 39). Pinder was president of Standard. The corporate entity of These alleged loans were made during the period when Mojave is and was of serious doubt, having had its charter revoked by Nevada and having failed to qualify to do business in Utah. (R. 5, 6, 7; Depo. 46). Further, there was serious question as to whether the alleged loan was actually made. (Depo. 40, 41, 43, 44, 45). Because of the questionable aspects of the Mojave claim, together with the fact that the security on the second mortgage was either nonexistent, dissipated, or worthless (Depo. 17, 19, 40, 41), and the additional threat of a Chapter X proceeding (Ex. P-6), Mojave agreed to become an unsecured creditor.

The sole consideration given to Standard for this privilege was the release of the worthless security. (Depo. 41).

Thereafter, Standard filed with the court a proposed plan of arrangement, which was confirmed by Order dated August 13, 1962 (Ex. P-3). It was not until long after the final order, when Mesa Petroleum Co. had acquired the assets of Standard, that Mojave asserted its claim to an existing debt against Standard's successor, Mesa. Mesa disputed the claim and Mojave brought suit to collect a sum of $20,000, plus interest. Among other defenses, Mesa plead a discharge in the Chapter XI proceedings and the District Court granted a Summary Judgment dismissing the claim. The Utah Supreme Court affirmed, whereupon Mojave petitioned for a Writ of Certiorari.

ARGUMENT

Petitioner concludes that the Utah Supreme Court has incorrectly interpreted and applied Section 371 of the Bankruptcy Act (11 U.S.C. 771). This conclusion is apparently based on the fact that the Utah Court failed to apply *Zavelo v. Reeves,* 227 U.S. 625, 33 S. Ct. 365, 57 L. Ed. 677 (1913), but rather applied the clear and concise language of the present day statutory provisions, enacted in 1938, relating to Chapter XI proceedings, together with Federal Court decisions interpreting and applying these provisions.

Based on this erroneous conclusion, petitioner proceeds to describe several undesirable consequences which, it asserts, will befall all future bankruptcy proceedings in the State of Utah. Stripped of its excess verbiage and the camouflage of form designed to meet the requirements of this court's Rule 19, Petitioner in effect contends:

A. The Utah Supreme Court's decision will stop trade creditors from continued extension of credit after a debtor files a Chapter XI proceeding, and that no one will advance moneys to the debtor for rehabilitation.

B. That the Utah decision effectively stops all secured creditors from dealing with the distressed debtor and forces the secured creditor to repossess his security immediately.

Counsel for petitioner does concede, however, at page 6 of his brief, that the provisions of the Chandler Act answer each of the foregoing contentions. If a debtor obtains an order authorizing it to continue in business as a "debtor in possession" under the aegis of the court pending confirmation, obligations incurred with the express or implied consent of the court are entitled to priority as costs of administration and to payment in full upon confirmation from the deposit required under Section 337 (2) of the Bankrutpcy Act. (11 U.S.C. 737 (2)). See, 9 Collier on Bankruptcy, 14th Ed., Sec. 8.11, p. 180, and Sec. 7.05, pp. 24-25. Section 367 of the Bankruptcy Act (11 U.S.C. 767) provides that the "Arrangement and its provisions shall be binding upon the debtor, . . . [and] upon all creditors . . ." upon confirmation. A creditor desiring to be protected can do so either under the cost of administration provision or by conditioning further advances of moneys upon specific protective provisions contained in the Plan of Arrangement.

The contention that secured creditors cannot now deal with the debtor is equally fallacious since a secured creditor can protect himself by remaining secured, instead of attempting to fluctuate at will between a secured and an unsecured position whenever it becomes advan-

tageous to do so. The debtor can also protect himself by making certain the Arrangement provides for his claim.

Petitioner asserts that the Utah Court failed to apply the theory of revival as enunciated by this Court in *Zavelo,* supra. The Utah Court did not follow *Zavelo,* supra, for reasons which per se answer the question presented herein, which reasons will be discussed in their order:

A. The present day statutory provisions, together with recent (after 1938) cases interpreting these provisions and their application to the facts of this case, demand the conclusion reached by the Utah Court.

B. The Utah Court based its decision on equitable grounds peculiar to the isolated and unique fact situation of this case, which unique facts were not present in *Zavelo,* supra.

THE PRESENT DAY STATUTORY PROVISIONS AND CASE LAW SUPPORT THE UTAH DECISION

The Chandler Act, which was passed in 1938 and is the present day statutory provision relating to Bankruptcy, gives broad relief for financially distressed businesses by means of composition and/or extension of unsecured obligations. The Chandler Act affords relief that could not and cannot be obtained at common law. Chapter XI proceedings under the 1938 Act are set forth in detail, together with the effects of these proceedings, in United States Code, Title 11, Section 701 et seq.

An agreement was consummated between Mojave and Standard wherein Petitioner became an unsecured creditor in the amount of $20,000. The formal agreement was executed sometime in June, 1962. (Ex. P-6 & P-7). The sole consideration for this agreement was the release of the security. (Depo. 41). Mojave was aware of the Chapter XI proceedings, and knew of the legal consequences following the release. Mojave could either release the worthless and non-existent security, or face proceedings under Chapter X of the Chandler Act. (Ex. P-6 & P-7). There is no argument that at this date Petitioner did in fact release its security.

The real question before this Court is what effect, if any, did the confirmation of Standard's Chapter XI proceedings have upon the agreement of June, 1962 which placed Mojave in the status of an unsecured creditor? The language of the Act itself answers this decisive question.

SECTION 307:

> "(1) "creditors shall include the holders of all unsecured debts, demands or claims of whatever character against a debtor . . ."

SECTION 308:

> "A creditor shall be deemed to be "affected" by an arrangement only if his interest shall be materially and adversely affected thereby."

SECTION 367:

> "*Upon confirmation* of an arrangement —
>
> (1) *the arrangement* and its provisoins *shall be binding upon the debtor,* upon any person

issuing securities or acquiring property under the arrangement and *upon all creditors of the debtor, whether or not they are affected by the arrangement, or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed and are allowable;*" (emphasis added)

SECTION 371:

"*The confirmation* of an arrangement shall *discharge* a debtor from all his *unsecured* debts and liabilities provided for by the arrangement." (emphasis added)

Congress gave further expression to the importance of the binding effect of the arrangement upon *unsecured* creditors which are *unsecured* on the critical date of confirmation in Section 381. This provision refers to proceedings wherein bankruptcy in the usual sense becomes necessary after a confirmation has failed and the debtor is adjudged a bankrupt. This generally occurs when the terms of the arrangement have been breached or become impossible. It then becomes necessary to provide for the unsecured obligations incurred *after* the confirmation. Section 381 states:

"Where, after the confirmation of an arrangement, the court, shall enter an order directing that bankruptcy be proceeded with . . .

(1) the unsecured debts incurred by the debtor *after the confirmation* of the arrangement and before the date of the entry of the final order directing that bankruptcy be proceeded with shall, unless and except as otherwise provided in the arrangement or in the order confirming the arrangement, share on a parity with the

> prior unsecured debts of the same classes, provable in the ensuing bankruptcy proceeding, and for such purpose the prior unsecured debts shall be deemed to be reduced to the amounts respectively provided for them in the arrangement, less any payment made thereunder;"

Obviously, there is no need to provide for a creditor who was unsecured at the time of confirmation since Congress had already provided that they would be bound upon confirmation.

Section 357 of the Chandler Act provides:

> "An arrangement made within the meaning of this Chapter may include —
>
> (1) provisions for treatment of unsecured debts on a parity one with the other, . . ."

In effect, Mojave is now before this Court seeking a better and more desirable position than other general unsecured creditors.

In speaking of the provisions of Section 367 (1), *Collier on Bankruptcy,* 14th Edition, Volume 9, Section 9.25(5), page 340-341 states

> "That reference to creditors is a sweeping one. It is not essential to confirmation that an arrangement be accepted by all creditors, but creditors who have not accepted the arrangement as well as creditors who have accepted it, are bound upon confirmation. A creditor cannot escape the effect of an arrangement by not filing a proof of claim; such a creditor, as well as creditors who have filed their claims, is bound upon confirmation. Nor is it material whether a creditor's claim has been scheduled, or is allowed, or is even allowable, or

> whether the creditor is affected by the arrangement. That creditor is nevertheless bound by the arrangement and its provisions upon confirmation. Even if a creditor is affected by the arrangement, and it makes no provision for him, so that he could have successfully opposed its confirmation, he is nevertheless bound by the arrangement and its provisions upon confirmation."

In *Gerson v. Booth Lumber Company,* 230 F.2d 631 (1955) which was decided under the Chandler Act, Justice Fee of the Ninth Circuit Court of Appeals stated at page 633:

> "It is correct to say that a *plan of arrangement is not binding on the debtor or the creditors* of the debtor *until it has been confirmed by the order of the Referee.*" (emphasis added)

Collier's Bankruptcy Manual, Second Edition, edited by Edelman and as revised by William T. Laube and W. J. Hill (1968), pages 1098-1099 states:

> "An arrangement becomes effective *only upon confirmation by the Court.*" (emphasis added)

Confirmation is the vital and key step which binds and discharges all unsecured obligations. The importance of the confirmation is expressed in *In Re Graco, Inc.* 366 F.2d. 257 (1966) at page 260 as follows:

> "It is clear that the determination of the referee is not supposed to be a perfunctory one, and the fact that the plan has been accepted by a requisite majority of creditors does not dispense with the need for the referee to exercise his 'own independent judgment.'" (citations omitted)

The clear and unambiguous language of Section 367 and the judicial pronouncement in *In Re Vulcan & Reiter* Co., 162 F.2d 92 (1947), a per curiam decision is indicative of the provisions of Chapter XI. At page 94 it states:

> "... It makes no difference that petitioner did not actually consent to the composition, the consent of the majority in number and amount of creditors has the same legal effect as actual consent by petitioner, having received what they bargained for or what was bargained for in their behalf as the case may be, have no further claim to receive the balance of their original claims from *any* source." (Court's emphasis)

Section 371 states:

> "*The confirmation* of an arrangement shall discharge a debtor from all of his unsecured debts and liabilities provided for by the arrangement ..."

It is stated in *Frey vs. Frankel,* 361 F.2d, 437 (10th CCA, 1966), at page 442,

> "... when the order of confirmation became final, the rights of the parties were fixed as of its entry."

Standard's Order of Confirmation became final by its own terms on the 7th day of September, 1962. It is *res judicata* to the rights of Mojave and Standard. No application has been timely filed under Section 386 to set aside or modify the arrangement. To allow Mojave to usurp to a higher or more preferred position by its own self dealing on dubious claims is to thwart completely the language of the present statutory provisions, as well as the case law. The Utah Court correctly applied the

clear and unambiguous provisions of the Chandler Act and the judicial pronouncements interpreting the Act.

THE UNIQUE AND ISOLATED FACTS OF THIS CASE ULULATED FOR EQUITY, AND THE UTAH COURT RESPONDED

This case is characterized by isolated and unique facts which invoked an equitable response from the District Court and was affirmed with alacrity by the Utah Supreme Court. Mojave's alter-ego, paterfamilias and confident, Pinder, engaged in self-dealing and complicated manipulation of Mojave's creditor status to a degree that impressed both courts. Mojave's entire case is based upon Pinder's recollections and negotiations while he was president of Standard. After taking Standard to the depths of financial despair, Pinder hurdled the fence and became the champion of Mojave, asserting that in his former capacity as president of Standard he recollected certain elusive and unsubstantiated transactions between Standard's Pinder and Mojave's Pinder. When Mojave's contentions were bathed in the intense light of an inquiring court, they simply did not stand up and were summarily dismissed.

Pinder, in the negotiations with Standard, knew the security was in fact worthless. Mojave made the decision to abandon the worthless and non-existent security to better itself at the expense of other unsecured creditors. The very purpose of the Chapter XI proceedings, and one of the fundamental requirements by legislative command, is that the arrangement, before being confirmed, be made in good faith and for equal protection to creditors of the same class. Mojave reaped the benefit of its

bargain and now after the passage of five years desires to be relieved of that bargain.

The Utah Supreme Court invoked equity to strike down Mojave's claim by the following language.

> ". . . this agreement which released the security in exchange for an unsecured claim, must have impressed the trial judge, as it does us, that the trausmutation of a secured debt into an unsecured claim was designed for no other reason or purpose than that Mojave could take advantage of Chapter XI and salvage something from Standard's insolvency, rather than nothing . . . We believe . . . in equity . . . someone should not have his cake and eat it [and] should be estopped . . . or should be held to have waived, abandoned or otherwise deserted any novel claim asserted years later. . . ."

* * *

> "It seems to us that where a creditor takes such a position at the time of his debtor's adversity, hardly can it say subsequently and after three or four years of quiescence that "Now that you have become prosperous, I will advise that whatever I did to change my creditor status, I now disconfirm, confirming my status at the time that you filed your petition, and disconfirm the order confirming the arrangement, . . ."

The Utah Court refused to let Petitioner change at will its creditor status to usurp to a more advantageous position. The Utah decision concerning this unique fact situation is in accordance with well established principles of equity requiring this Court to deny its certiorari jurisdiction.

CONCLUSION

Respondent submits that the Utah Court was correct in applying the clear and decisive language of the Chandler Act as interpreted by the recent cases of *Frey v. Frankle,* supra; *In Re Vulcan,* supra; *Gerson v. Booth Lumber Company,* supra; and *In Re Graco, Inc.,* supra. It is further submitted that the holding of the Utah Court is based upon equitable considerations springing from the isolated and unique facts of self-dealing and complicated manipulation, together with the unsubstantiated and elusive recollections of the dual-roled Pinder and the refusal of the Courts to allow further manipulations.

The decisive reasoning of the Utah Court is not contrary to the prevailing statutory and case law nor equitable principles. None of the Petitioner's alleged fears relating to future Bankruptcy proceedings will in fact occur, as attested by Petitioner's own admissions. It is, therefore, respectfully requested that this Court deny the Petition for Writ of Certiorari.

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